The rise of government law enforcement in England

NICHOLAS A. CUROTT*
Department of Economics, George Mason University
nick.curott@gmail.com
and
EDWARD P. STRINGHAM
Hackley Endowed Chair for Capitalism and Free Enterprise Studies
Fayetteville State University, North Carolina
edward.stringham@gmail.com

I. Introduction

Public choice economics is often referred to as the study of "politics without the romance" (Buchanan 1999). Instead of simply assuming that government agents are benevolent pursuers of the public good, public choice models them as real life individuals who have desires and concerns of their own. From this perspective, it becomes natural to consider the possibility that any given government policy may have been created to satisfy private special interests rather than the interest of the general public (Buchanan and Tullock 1962). With its insistence on rigorous analytical tools and realistic methodology, the ascendance of public choice has simultaneously modernized research on the political process as well as engendered a healthy dose of skepticism regarding the desirability of previously accepted government functions. Curiously, the romantic, public-interest notion of government retains a lingering influence in

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scholarship on law. The romantic view of the law can even be found in the writings of the founders of public choice.[1]

The general premise of the public interest approach is that government courts and police exist because it is impossible to adequately provide these services in any other way, and therefore the government is merely acting beneficently to fulfill demands of the polity that would otherwise not be met. Theorists argue that only government can create the rules that reduce conflict, facilitate exchange, and bring order to society. Without government law enforcement, conflicting claims to scarce resources would lead to violence, and society would degenerate into the Hobbesian "nasty, brutish and short" outcome. According to this view, government law is necessary so that individuals can coordinate their actions to undertake the complicated arrangements that enable a modern division of labor in society and the wealth it engenders.

This sort of reasoning is evident in the writings of early public choice economists, particularly James Buchanan, Winston Bush, Gordon Tullock, and others at the Center for the Study of Public Choice in the early 1970s who sought to develop a theory of the origins of government (Tullock, 1972, 1974, Buchanan, 1975). Absent government-created rules, society is a prisoners' dilemma with a Nash equilibrium in which individuals do not respect property rights. The

[1] See the Center for the Study of Public Choice monograph *Explorations in the Theory of Anarchy* (Tullock, 1972) and the follow-up *Further Explorations in the Theory of Anarchy* (Tullock, 1974). For a discussion of these works, see the edited volume *Anarchy, State, and Public Choice* (Stringham, 2005).

resulting distribution of property is suboptimal because each person must devote time and effort toward plunder or defense against predation. In Buchanan's view, all individuals would agree to form government to secure property rights and prevent predation.

> They agree to appoint a referee or an umpire, inform him about the specific rules under which they choose to play, and ask that he enforce adherence to these designated rules. This is precisely the functional role assigned to the state and its law enforcement task. The state becomes the institutionalized embodiment of the referee or umpire, and its only role is that of insuring that contractual terms are honored (1975, 67).

The foregoing story is not too dissimilar from the one told in most high school civics textbooks. Since the 1970s, however, many public choice scholars have questioned this public interest story altogether (Benson 1990, 1994; de Jasay, 1989; Ekelund and Dorton, 2003). The first economist to develop a self-identified "public choice approach" to analyze the rise of the government provision of law enforcement was Bruce Benson (1990, 85). If self-interest explains how individuals behave within the legal system, it should equally explain how they interact to establish the legal system itself. Benson (1990, 1994) and more recently Ekelund and Dorton (2003) examine the history of law enforcement in England through a rational choice perspective and find a completely different story from that in high school civics textbooks. Centralized police and courts were created to bring revenue to the state.

Nearly one thousand years ago, before the existence of centralized government police and courts in England, disputes were settled in a

decentralized and in many ways voluntary manner.[2] When disputes occurred, private groups would ask the wrongdoer to pay restitution to the victim, and if the wrongdoer refused he would be viewed as an outlaw. Decisions that were successful at resolving conflict became embedded in the customary practices of the community. In this way, rules of law emerged outside of the government to foster social order and provide strong incentives for individuals to interact peacefully (Hasnas 2008).[3]

Over time, however, the kings saw the court system as a potential source of revenue. Rather than having the full restitution go to the victim, they declared that fines must be paid to themselves for more and more offenses because they violated the King's Peace. After the Norman conquest of England in 1066 A.D., restitution was completely replaced by a system of fines and punishments. Under this new arrangement, individuals no longer had sufficient incentive to voluntarily participate in the maintenance of law and order. The effectiveness of

[2] The system was decentralized and had many voluntary elements, but it definitely not a voluntaryist utopia. We will refer to it as polycentric to mean law was provided by more than one center, but we do not want to imply that all of the relationships were voluntary. Lords asserted coercive power over peasants who were not free in any modern libertarian sense. The relevant comparison, however, would not be how much liberty the typical person had then compared to the typical American today. The relevant comparison would be how much liberty the typical person had during those times compared to the typical person in other regions during those times or to the typical person in that region throughout the first half of the second millennium.

[3] As Hasnas explains, "It is true that, beginning in the late twelfth century, the common law developed in the royal courts, but this does not imply that either the king or his judges made the law. On the contrary, for most of its history, the common law was entirely procedural in nature. Almost all of the issues of concern to the lawyers and judges of the king's courts related to matters of jurisdiction or pleading; that is, whether the matter was properly before the court, and if it was, whether the issues to be submitted to the jury were properly specified. The rules that were applied were supplied by the customary law."

the old institutions gradually broke down, and the central government created new institutions to fill the void. In this version of the story of government-provided law, public policing emerged due to the alteration of property rights that occurred when government precluded restitution.

According to the accounts of Benson, Ekelund, and Dorton, the idea that government police and courts were created to address a market failure is simply a post hoc justification of what government currently does. The recognition that government did not always provide law opens the door for further scientific examinations of alternative possible institutional arrangements for providing law enforcement, including the relative desirability of private versus public methods of provision. Rules governing conduct can come into being in two different ways. One is by investing a single agency with a monopoly power to create and enforce rules that everyone in society must obey. But a second, often overlooked method is to allow individuals to follow rules that emerge over time through human interaction. The latter collections of rules are frequently enforced by an array of people. If law is defined according to noted legal philosopher Lon L. Fuller's (1964, 106) classification as "the enterprise of subjecting human conduct to the governance of rules," then the provenance of law does not lie solely in government.[4]

[4] Fuller (1964, 123) himself noted that "A possible objection [to his definition of law] . . . is that it permits the existence of more than one legal system governing the same population. The answer, of course, is that such multiple systems do exist and have in the history been more common than unitary systems."

Law developing outside a coercive monopoly of power, whether it is customary or private, is commonly called "polycentric."[5] Examples of polycentric legal order are abundant. Historically, a large number of societies were essentially stateless, yet managed to enforce commercial contracts and develop rules for protecting individuals and their property. To take but a few examples, consider the Massims of the East Papuo-Melansian region (Leeson 2006), the Ifugao of the Philippines, various Native American tribes such as Yuroks of Northern California (Benson 1991), or pre-colonial African tribes such as the Tiv or Nuer (Leeson and Stringham 2005), all of which were stateless social orders or nearly so. Furthermore, large areas of the modern world operate in the absence of governments strong enough to provide effective third party enforcement of contracts or even basic protection of private property.[6]

This fertile field of study has given rise to a large and growing body of scholarly research documenting how institutional mechanisms have evolved in many situations, both modern and historical, to create incentives for individuals to cooperate in the provision of law enforcement in the absence of a government monopoly.[7] The customary law of ancient and primitive societies, which arose before state law, furnishes an ample source of case studies on how polycentric

[5] The term "polycentric" is generally attributed to Michael Polanyi (1951), and was brought into the study of law by F. A. Hayek and Lon Fuller. See Barnett (1998, 257-297) for a detailed exposition of polycentric legal order.

[6] According to the 2007 Failed State Index, thirty-two countries have governments on the verge of collapsing. Somalia has intermittently lacked any central government at all since 1991 (Little 2003).

[7] For an overview of this literature, see the edited volumes Stringham (2005) and Stringham (2007).

law functions in practice. These societies exhibit surprisingly complex legal systems that recognize freedom of contract, individual autonomy, and private property rights, as well as sophisticated ways of enforcing legal rules. The institutions enabling social order within this context have a wide variety. They have been based on kinship or religion, as with the Kapauku Papuans of West New Guinea (PopÍsil 1974); on surety, as developed by the *brehons* in Celtic Ireland (Peden 1977); and on contractual agreement, such as between the *godi* and *thingmen* in medieval Iceland (Friedman 1979; Solvason 1992, 1993).[8]

The widespread efficacy of polycentric law is also evident in an examination of the history of commerce. Grief (1989) examines how the Maghribi traders of the 11th century Mediterranean were able to enforce contracts in extra-governmental institutions even under asymmetric information. Landa (1981) more generally describes how middlemen can provide an institutional alternative to contract law when formal government enforcement is weak or non-existent. Of particular note is the *Lex Mercatoria*, or Law Merchant, a sophisticated and extensive system of polycentric commercial law that emerged to meet the needs of international commerce in medieval Europe. The very

[8] Further examples of polycentric legal order include the self-enforcing institutions created by 17th and 18th century pirates (Leeson 2007a) and the *Leges Marchiarum* of the Anglo-Scottish borderlands in the 16th century (Leeson 2007b). From more recent history, Anderson and Hill (1979) describe how property rights were formed and protected in the early American West under voluntary associations, including private protection agencies, vigilantes, wagon trains, and mining camps. Similarly, Umbeck (1981) describes how secure property rights were established spontaneously during the California gold rush in the absence of formal legal authority. From the present day, Ellickson (1991) explains how ranchers and farmers in Shasta County, California manage to settle disputes outside of the formal legal system. Sobel and Osoba (2006) discuss how youth gangs act essentially as protection agencies by enforcing rules in the face of government failure to protect young people from violence.

system of legal rules that governed trade between merchants and provided the impetus for the Commercial Revolution was established, arbitrated, and enforced privately (Benson 1989; Milgrom et al. 1990). Even today no state-made supranational authority enforces commercial contracts between traders of different nations (Plantey 1993). Polycentric legal order is a ubiquitous feature of human interaction. Legal institutions operate so uniformly in the absence of government provision that scholars such as de Jasay (1989), Friedman (1989), and Holcombe (1997) have questioned the public goods justification of government law altogether.

The widely held belief that only government can provide law and order is perhaps due to a facet of human psychology, often conspicuous in former communist countries, in which after the government provides something for a long time it becomes difficult for the populace to imagine any alternative. As an attempt to remove the status quo bias, this chapter reexamines the story of the evolution of government law enforcement in England, as previously examined by Benson, Ekelund, Dorton, and others. Relying on books written by historians and legal scholars who have studied this area, but not necessarily from an economic point of view, we provide additional details about how the polycentric system functioned and what happened after the state monopolized it. Monopolization of law did not occur because government wanted to address a market failure. It occurred because it was a way to enhance revenue for the state.

The idea that government law enforcement was chosen by individuals in need of a referee is a myth.

The chapter proceeds as follows. Section II discusses the polycentric system of law enforcement in pre-Norman England. Section III provides details about the rise of government law as kings wished to find ways to enhance revenue and consolidate their power. Section IV concludes.

II. Before Monopolization: The Polycentric History of Anglo-Saxon Law

Imagine a time when the population of England was less than one fiftieth of what it is now and less than 10 percent of residents lived in towns. A thousand years ago, England was quite rural and undeveloped compared to modern society, with most people being what moderns would describe as peasants. Nevertheless, compared to other countries at the time, England was relatively rich, and "the staple trade of London was already in such commonplace goods as timber, fish, wine, dairy produce, eggs and hens, wool and cloth" (Sawyer 1965, 161-163). People used oxen with a wheeled and iron bladed plough to farm the earth (Lacey and Danziger 1999). As they said at the time, "The ploughman gives us bread and drink" (quoted in Alexander 2002, 241). Englishmen had a relatively good diet and were also about as tall as most people are today (Lacey and Danziger 1999). More important, for the purposes of this paper, the English

people began developing many important legal concepts that influence our law today (Zywicki 2004).

The origins of Anglo-Saxon law can be traced back to earlier Germanic customary law. The Anglo-Saxons descended from a group of Germanic tribes that invaded England in the middle of the 5th century A.D. These invaders brought with them an elaborate and developed legal system. Legal rights and obligations were based on customary practices and enforced by kinship groups (Lyon 1980, 59). Germanic tribes were divided into *pagi*, each of which consisted of a hundred men or households. Each *pagus* was further divided into kinship groups called *vici*, which were responsible for policing. The men who made up the *vici* were bound by custom and the ties of kinship to protect each other and to pursue and capture criminals after an offense was committed. Such reciprocities formed the basis of a voluntary system for ensuring the rights and protecting the property of individuals in the community. When the *vici* successfully captured and convicted an offender, custom governed that he make restitution according to a well-defined system of payments. To ensure compliance, offenders who did not pay restitution were outlawed. This was a large private cost, as outlaws could not seek restitution or protection from the legal system, and they might be killed with impunity. This Germanic system formed the foundation for Anglo-Saxon law (Lyon 1980, 11-18). The conversion of the Anglo-Saxons to Christianity resulted in many modifications, particularly in family law, but the basic

underlying Germanic legal structure remained largely unchanged until the Norman Conquest in 1066 A.D. (Whitelock 1952, 134).

The Anglo-Saxons, like their Germanic ancestors, did not have a standing body of professional law enforcers similar to modern police. It was the victim's duty to seek justice after a crime was committed against him. However, a number of institutions, including the *borh* system and the *hundred*, evolved to effectively provide law and order and to ensure the protection of individuals and their property.[9] These institutions came into existence privately and relied primarily on mechanisms outside of the government.

Anglo-Saxon law rested on a foundation of a surety system known as *borh* (Morris 1910; Cam 1930; Plucknet 1956, 628-632). The borh system was essentially law employed among neighbors (Morris 1910; Liggio 1977, 273-274). Neighbors formed into groups of ten or twelve through a process of decentralized and more or less spontaneous association. Each individual was responsible for the overall good behavior of the group and agreed to pay the fines of any member who was convicted of violating the law. Every free man thus stood in pledge or surety (*borh*) to his fellow men (Stenton 1950, 251). Members of the pledge associations

[9] A well-known application of the "folk theorem" is that individuals have an incentive to cooperate in reciprocal provision even without external enforcement when they are sufficiently patient and expect to interact repeatedly (Axelrod, 1984; Sugden, 1986). Additionally, many economists have argued that reputation mechanisms may be sufficient to ensure cooperation in interactions between all individuals, even those who are not involved in repeated dealings, because cheaters can be excluded from all forms of social interaction with the members of groups with whom they do have ongoing relationships (Williamson, 1983; Golden, 1988; Brubaker, 1988; Schmidtz, 1991; Ellickson 1991). The history of Anglo-Saxon England illustrates how folk theorem-type institutional arrangements were sufficient for establishing law and order under moderately complex conditions characterized by a relatively small number of individuals.

thus had a powerful financial incentive to monitor and police the behavior of everyone in the group and to exclude individuals with a poor reputation. In this way, each man enjoyed some measure of protection for his own life, person and property, and he also had a reciprocal duty to protect the life, person and property of others.

Furthermore, surety associations formed a strong basis for ensuring social order, as individuals of bad character could be excluded from participating in trade and exchange. As Liggio (1977, 273) explains, "Every person either had sureties and pledge associates or one would not be able to function beyond one's own land, as no one would deal with one who had no bond or who could not get anyone to pledge their surety with him." Since the choice to pledge on behalf of another was voluntary, individuals had a strong incentive to maintain good reputations and abide by the law. And since it was impossible to capture the benefits of social interaction without belonging to a surety, it was in the individual's own self-interest to join. As Benson (1990, 23) puts it, "…anyone who wanted to participate in and benefit from the social order was bonded." Mechanisms of reputation and exclusion were therefore sufficient to ensure a measure of security, order, and respect for the law through purely voluntary means.

In addition to the *borh* system, by the 10th century a legal institution called the *hundred* had come into existence; this became the primary means for dealing with theft and personal injury. The hundreds were largely concerned with

violent offenses and theft, particularly the theft of cattle, and with dispensing justice (Pollock and Maitland 1899 vol. 1, 556-560). In effect, these largely voluntary associations of free men provided the police system for all of Anglo-Saxon England (Stephen 1883, 66).

The origins of the hundred are somewhat obscure, but there is little doubt that the institution has roots dating back even before the tenth century (Blair 2003, 236). The earliest description of the hundred appears in an anonymous royal decree compiled between 945 and 961, which enjoined that a meeting be held every four weeks and that "every man do justice to another" (232). The royal nature of the decree may give the impression that the hundred was a governmental body brought into existence by the central lawmaking authority to function as an organ of the state. However, this interpretation would mistake the essence of the hundred. As Loyn (1984, 146) explains: "It had full official support and sanction, but has to be read in a context of voluntary self-help, of rural peace guilds brought into being to protect property and life." It is only reasonable to infer that a formal meeting had been established in custom long before it was enshrined by the mid-10th century ordinance (Blair 2003, 235-236). As such, the hundred came into being as a local organization for taking action against theft and dispensing justice, largely with non-government enforcement, as detailed below.

To carry out policing duties, the hundreds were composed of ten *tithings* of ten men each. One of the ten men in each tithing, called a *tithingman*, would be

effectively in charge. Similarly, a *hundredman* stood in charge of the hundred. The ten tithingmen, the hundredman, and a clerk met every four weeks, mostly for administrative purposes. However, they also formed what might be considered the principal law enforcement body. The hundredman, for example, was responsible for preventing cattle thievery. He was to be informed when a theft occurred, and he would charge one or two men from each tithing to pursue the thieves and bring them to justice. To ensure that individuals performed their duties for the hundred, a system of increasing fines punished shirking (Blair 2003, 232-233).

In addition to providing law enforcement, the hundred also held a court, called a *moot*, for settling local judicial matters (Whitelock 1952, 139; Pollock and Maitland 1899 vol. 1, 42). The judicial function at that time was divided between the hundred court and a higher shire court. The shire court was one of the principal tools used by kings to raise money and exert the necessary influence to defend against foreign conquest. At first an ealdorman, and then later a shire reeve or "sheriff"—the king's main representative in the shire at different points—presided over the shire court. As Warren (1988, 43) emphasizes, however, although the hundred and shire courts "met at the behest of royal authority and were answerable to the king for defaults of justice, they cannot in any meaningful sense be described as 'royal' courts. They did not administer a body of royal law under the direction of judges appointed by the crown: they operated by customary procedures in applying customary law."

The shire court met only twice per year and was primarily concerned with administrative tasks. In addition, the shire court would hear a few lawsuits, including some that the hundred court passed up, presumably when it was unable to reach a verdict or when the dispute ranged across the jurisdictions of two different hundreds. The hundred court, however, was the primary court for settling day-to-day disputes, "the judicial unit, so to speak, for ordinary affairs" (Pollock and Maitland 1899 vol. 1, 42).

Interestingly, the customary legal system enforced by the hundred court shared many of the characteristic features of archaic law as well as advanced customary legal systems, such as the ones developed in medieval Iceland and Ireland.[10] Law is recognized in customary legal systems because individuals have a private incentive to bind their actions in accordance with predetermined rules. Each individual realizes that there are benefits to be had from restricting his behavior so that it conforms with others' expectations, as long as they behave as he expects as well. Thus, as Benson (1990, 12) has put it, "reciprocities are the basic source both of the recognition of duty to obey law and of law enforcement in a customary law system."

Since Anglo-Saxon law was largely based on a voluntary recognition of mutual benefit, instead of being coercively imposed from above, the hundred was primarily concerned, in essence, if not in all of its aspects, with the

[10] See Benson (1990, 11-41) for an in-depth discussion of customary legal systems with voluntary enforcement. Friedman (1979) discusses in detail the private creation and enforcement of law in Iceland, and Peden (1977) similarly describes Celtic Irish law.

protection of individual rights and private property (Benson 1990, 20). Infractions of the rules, which included provisions for many offenses that we now define as crimes, were treated as torts. Although some public offenses did exist in Anglo-Saxon society at this time, the law was primarily concerned with righting private wrongs. The laws treated homicide, rape, theft, and all manner of wounding in great detail. And since participation and enforcement relied upon voluntary cooperation, punishment of offenses was geared toward providing restitution to the victim.

The court itself served primarily as a place for obtaining good witnesses. The court was presided over by tithing representatives called thegns. Four men from each tithing acted as *suitors* of the court. A representative body of twelve suitors formed a judicial committee, which arbitrated disputes between members in its jurisdiction (Stephen 1883, 68). This service was a duty incumbent upon the office holders, for which the king gave patronage in return. However, neither the king nor his thegns forced individuals to use the hundred court (Pollock and Maitland 1899 vol. 1, 43). Executive power was too weak at this time to compel individuals to do so, even if it had wanted to. Instead, the hundred had to rely mainly on positive incentives to incite cooperation (Benson 1994, 253). Compensation for the victim, in particular, provided a strong incentive to use the legal system, although the hundred system also provided several other private benefits, such as the return of lost or stolen cattle.

The procedure for lawsuits was stringent, and the slightest misstep at any stage could result in the loss of the case (Pollock and Maitland 1899 vol. 1, 38; Whitelock 1952, 139-142). Trials of evidence in the modern sense were virtually unknown. Instead, guilt or innocence was determined by a system of oath giving. Lawsuits began when a party who thought he had been wronged came to the hundred court and made a charge against someone in the form of an oath. If the court decided the case was valid and worthy of hearing, they would set a date of appointment and summon the defendant to appear.

On the day of the hearing, the plaintiff began with what was called a fore oath, and then he would make his accusation in front of witnesses and the accused party. Usually, the defendant would then be allowed to establish his innocence by swearing an oath. To clear himself, the defendant required corroboration from a prescribed number of compurgators or "oath-helpers," which varied according to the nature and severity of the accusation.

Neither the defendant nor his compurgators were required to present any evidence to the court. For obvious reasons, therefore, accusations carried less weight than denials, which was established in custom as a basic principle of the law (Whitelock 1952, 140). A defendant who was able to muster the requisite number of oath-helpers was declared innocent and absolved of any wrongdoing. In a few cases, however, the defendant was not deemed worthy of making a valid oath. This would happen if, for example, he had been the subject of previous infractions or frequent accusations, or if he was caught in the act. In

such cases it was sufficient for the plaintiff to produce witnesses who would swear an oath that they were present at the scene of the crime and observed it with their own eyes.

The system of oath giving may appear unsophisticated and open to exploitation, but it could actually serve as a reasonable method for tapping localized knowledge. The hundred was responsible for relatively few individuals, and members of its jurisdiction had continual interaction with one another and were bonded together by mutual pledges and duties. Reputation effects were significant. Oath-helpers knew the character of the person they were helping and were likely to know the facts of the case, or at least were in a position to know them better than anyone else. Furthermore, perjury was subject to stiff penalties. Anyone found to be a perjurer was no longer considered oath-worthy, and thereafter would only be and thereafter could only be tried by ordeal or pay a heavy fine (Whitelock 1952, 141). For all of these reasons, a guilty person would have difficulty obtaining sufficient oath-helpers.

Defendants who failed in making a successful oath, either because they were unable to procure the requisite number of oath-helpers or because they were not deemed oath-worthy, were given the option of proving their innocence by way of ordeal. The trial by ordeal was intended to elicit the judgment of God, who acted as an arbitrator and, it was thought, revealed the innocence or guilt of accused parties. The ordeal should not be viewed simply as a torment imposed on unwilling defendants, as it also provided a new opportunity to clear oneself

of accusations. Notably, the mass-priest administered the ordeal after three days of fasting, during which time the defendant could change his mind and confess (Whitelock 1952, 142).[11]

To modern sympathies the ordeal system appears primitive and even inhumane. Considered within the context of its own time, however, it may have been an effective mechanism for facilitating the peaceful resolution of disputes (Benson 1998, 199). Since existing technology made it difficult to gather evidence and definitively establish guilt or innocence, violent conflict could easily break out between disputing groups. However, under the ordeal system individuals had a strong incentive to confess transgressions and make restitution. Belief in God was prevalent, so most lawbreakers would have feared that the ordeal would expose their guilt. In addition, the prospect of having to face an ordeal may have been an effective deterrent for potential lawbreakers. So, although it was an unsound method of determining innocence, the ordeal may have been an effective solution for some unique problems confronting dispute resolution in medieval times.

[11] Anglo-Saxons, unlike other Germanic tribes, did not have an ordeal of trial by combat (Pollock and Maitland 1899 vol. 1, 39). Instead, the main forms of ordeal were fire or water (Berman 1983, 57; Whitelock 1952, 142). In the case of fire, the accused party was required to carry a red hot iron bar nine feet. After this his hand would be enveloped, and after three days the envelope would be removed and the wound inspected to see if it was clean or festering. Those with a clean wound were presumed to have been preserved by God, indicating their innocence, and were absolved of all wrongdoing. The ordeal of water could involve hot water or cold water. In the hot water ordeal, the defendant was required to plunge his hand into a boiling hot cauldron of water and take out a stone, and he was declared innocent if his wounds were not festering after three days. In the case of cold water, the defendant would be thrown into a river, and if he sank he would be found innocent.

All of the procedures mentioned thus far existed simply to establish a judgment. If a defendant was found guilty, the court would order him to make monetary restitution to the victim or his family, called *bot* (Pollock and Maitland 1899 vol. 2, 451). The amount of compensation required for various offenses evolved through custom and then became formally enshrined in codes of law, which kings issued at regular intervals. A first time offender could make restitution for any crime except for a few, including arson, open theft, and concealed murder, called 'bootless'; the punishment for these crimes was death and forfeiture of property (Pollock and Maitland 1899 vol. 2, 457-458). Each man in Anglo-Saxon England was ranked according to his *wergild*, or the fixed price that was required to make restitution for killing him.[12] In a homicide case, the transgressor could make amends by paying the price of the victim's *wer* to his family. Similarly, compensation or *bot* was prescribed for other crimes as well. Often this was a fixed amount. For example, the economic compensation required for inflicting different kinds of wounds was pre-established and treated in great detail. So much would have to be given for the loss of an eye, so much for the loss of a particular finger, so much for a toe, and so on. In the case of theft, the offender would often have to pay the market price of the stolen goods.

Anglo-Saxons did not have jails for the regular incarceration of criminals. Unlike today, the legal system was tailored to represent the interests of the

[12] See Seebohm (1911) for a detailed description and account of the wergeld system in Anglo-Saxon England.

victim. Indeed, to an Anglo-Saxon, incarceration would have seemed like a particularly unsuitable means of making amends for a crime, as it does nothing to make the victim whole again (Berman 1983, 55). Nevertheless, institutions developed to prevent violence even when an individual could not pay his debt. In some cases involving large payments, a reprieve would be granted to the offender, and he would be given up to a year to come up with the money (Pollock and Maitland 1899 vol. 2., 451). A form of indentured servitude, or temporary slavery, was another means of ensuring payment (449). The term would be set for a given period, usually a long one, after which the criminal was cleared.

A particularly interesting feature of Anglo-Saxon law enforcement is that courts had no power to coerce compliance with their decisions. As Pollock and Maitland (1899 vol. 1, 37) explain, "An Anglo-Saxon court, whether of public or private justice, was not surrounded with such visible majesty of the law as in our own time, nor furnished with an obvious means of compelling obedience." Instead, refusal to comply with judicial decisions put an individual outside the protection of the law. Outlaws could be killed with impunity, and heavy penalties could be assessed to anyone caught aiding them. Outlawry added the necessary weight to the decisions of the hundred court to ensure regular compliance. Individuals who did not pay restitution were outlawed (Stephen 1883, 62). Likewise, seeking personal vengeance instead of accepting restitution would also result in outlawry (Pollock and Maitland 1899 vol. 1, 47-48). Thus,

individuals on both sides of a dispute had a strong incentive to accept a peaceful settlement. Refusal to submit to the decision of the hundred court also carried the potential for a blood feud, which was only lawful when a convicted offender defaulted on his payment of wergeld (Polack and Maitland 1899 vol. 2, 451).

Outlawry was usually a sufficiently stiff penalty to ensure compliance with the law. Sometimes however, a wronged party had to face the opposition of a strong lord who would be tempted to shelter himself or his men from the justice of the law. In such cases, the wronged individual could go to a more powerful lord, such as an ealdorman or even the king, who ensure that the case was brought before the court. The king, however, did not have the sovereign power to compel obedience and did not enforce rulings. As Pollock and Maitland (1899 vol. 1, 48) explain, "His [i.e., the king's] business is not to see justice done in his name in any ordinary course, but to exercise a special and reserved power which a man must not invoke unless he has failed to get his cause heard in the jurisdiction of his own hundred." When it was necessary for the wronged party to ask for assistance, the offender was required to make an extra payment to the facilitating king or ealdorman, called *wite*, in addition to the proscribed restitution of *wer* to the victim or his kin.

The legal system of the Anglo-Saxons had many appealing features. In the early 19th century, the economist Edwin Chadwick wrote, "It must be acknowledged that the early state of the general police of this country possessed a degree of efficiency" (quoted in Ekelund and Dorton 2003, 275). The legal

system was oriented at least fundamentally, if not in many of its aspects, toward the protection of individuals and their private property. The punishment for harming an individual or stealing his property was monetary restitution, which provided at least a measure of compensation for the victim. And, while the actual process by which law is enforced under a system of outlawry should not be romanticized, it created, along with the ancillary institutions of the ordeal and the blood feud, a set of incentives that ensured at least a tolerable level of compliance. In essence, it was a system built upon the interests and preferences of the individual participants.

III. Government Monopolization of Law: Kings Seeing Courts as a Source of Revenue for the State

Anglo-Saxon society was highly decentralized. Government existed, but there was no nation-state. Communities were largely left to govern themselves, and its various functions and duties were typically carried out at the lowest levels. This condition particularly applied to the activities of governance that were concerned with the application of justice. Social norms and customs, as well as economic and religious factors, regulated society more than mandates of the rulers did. Local institutions, which consisted mainly of private inputs supplied by neighboring individuals, provided for the bulk of the courts and law enforcement. The incentive of self-interest ensured the effective operation of this system since participation provided private benefits. Overall, the influence of

the royal authority on governance was slight. As Warren (1987, 52) explains, "…there was no central direction of the shires themselves, no system of supervision by visitation, no central office for controlling the king's officers in the shires. This was not decentralized government; it was merely uncentralized." The king's agents appealed to the sovereign's power on occasion to ensure the sanction of force, but they did not dictate the substance of the law, provide police, or administer local communities.

Royal prerogative insinuated itself into everyday affairs to the extent necessary for maintaining the preservation of the realm, but the office of kingship did not evolve for the specific purpose of providing internal law and security. Instead, kingship emerged as an outcome of competition for power and in response to constant threats of external conquest (Blair 1956, 196-198; Benson 1990, 26-30). During the Anglo-Saxon period, however, royal institutions gradually played an increasingly larger role in the administration of law.

From the beginning, the crown was involved in some pleas, called the 'king's pleas' (Warren 1987, 43). These included both cases in which the king was the wronged party as well as certain serious offenses that were reserved by royal decree to be the king's prerogative. King's pleas were tried in the same courts as regular cases, but they required the presence of an authorized representative of the king. A guilty ruling did not require compensation, but instead involved punishments such as fines, forfeiture of property, and sometimes mutilation or

death. The proceeds went directly into the king's treasury. Anglo-Saxon kings thus began to view law enforcement as a potential source of revenue.

As monarchical power grew stronger and more secure, so did the king's effective ability to wring profit from the legal system.[13] The first step in this process was the incorporation of *wite* as a regular feature of the legal process. At first, an ealdorman or the king received *wite* only if his services were called upon to ensure that a victim could get his case heard in court. Very early during the Anglo-Saxon period, a payment of *wite* to the king became institutionalized and was required in addition to the regular compensation of *bot* to the victim.

More substantially, kings found an opportunity to raise funds by declaring various acts to be violations of the 'king's peace'; these required making a payment of *wite* to the king instead of compensation to the victim. Embedded in Anglo-Saxon law was the idea that every free man's house was protected by a peace, called *mundbyrd*, that entitled him to special compensation from intruders or anyone who burst into violent behavior on the property. This compensation was scaled according to each individual's rank, with the highest sum protecting the king's residence. Thus, originally, the king's peace merely referred to the peace of the king's own household, in the sense that he was afforded the same sort of rights as anyone else. But as royal power expanded, so did the king's peace. First it was extended to the king's lodgings as he traveled.

[13] It should be noted that while there is direct evidence that the king received significant and increasing revenue from the legal system, no systematic accounting record of its cost exists, so the exact amount of profit thereby obtained is indeterminate.

Then gradually it began to apply to places where he wasn't even present, such as highways and bridges, to churches and monasteries, and even to markets and towns. By the eleventh century, royal officials had the power to assert that the king's peace extended over wherever it was expedient (Lyon 1980, 42).

The overall profits from justice became one of the three main sources of royal revenue, along with profits from the king's estates and from his vassals' feudal obligations. Revenue from the king's jurisdictional rights in justice comprised a small part of the king's income at first, but it became increasingly significant. Furthermore, as Benson (1994, 255) has pointed out, funds obtained in this way were expedient because they were more liquid and easy to modify than income generated from other sources. Land was the largest source of royal revenue, but until the eleventh century payment consisted of agricultural produce and payments in kind by tenants (Lyon 1980, 44). Taxation was liquid, but relatively light. Moreover, incremental increases and adjustments in the amount collected through justice could be made relatively easily by increasing *wite* or expanding the king's peace.

Even more importantly, rights to the proceeds from pleas and forfeitures became something that the king could hand out to his supporters (Pollock and Maitland 1899, vol. 2, 453-454; Benson 1994, 255). The ability to exchange these rights played a pivotal role in the kings' expansion of power. Ealdormen received profits from justice in return for providing support in war and representing the king's interests in shire courts. Ealdormen consolidated their

influence, and, becoming known as earls, began to lord over multiple shires. The office of sheriff evolved such that he became the chief representative of the king within each shire. The sheriff received land from the king but also a share of the profit generated by judicial proceedings.

The process of royal involvement in the justice system begun by Anglo-Saxon kings accelerated after the Norman conquest of England in 1066 A.D. Nominally, William I retained and ratified the legal system that he found, and most of the offenses under the Anglo-Saxon customary law were retained. However, Norman rule brought about a radical shift in the nature of legal governance.

The invaders scrapped the restitution-based system of *wergeld,* which served as the foundation of all of Anglo-Saxon law, in favor of the Norman system of fines and punishments. The range of violations treated as breaches of the king's peace were consequently greatly expanded. Indeed, cases that the general procedure of the hundred court had customarily decided could be transferred to a hearing in a royal court if the victim simply decided to add to his charge that he had suffered the wrong 'against the king's peace' (Warren 1987, 135). At this time the Normans also introduced into England the concept of felonies, acts of betrayal or treachery against one's lord. The sum of these changes altered the character of the king's relation to the law. As Lyon (1980, 190) describes it, "the fortuitous yet conscious combination of the royal prerogative with the concepts of the king's peace and felony gave royal justice a

flexibility that enabled the royal court to spread its jurisdiction over all sorts of places and men and over almost any type of offense." A plausible motivation for implementing these legal changes was the Norman kings' desire to increase their income as much as possible.

The elimination of restitution also removed the most important private benefit accruing from voluntary cooperation in the legal system. Consequently, individuals no longer had a strong enough incentive to perform their duties for the hundred and tithings. The Anglo-Saxon *borh* and tithing gave way to the Anglo-Norman system of frankpledge (Morris, 1910). Under this new organization, the surety and policing functions were merged and made compulsory. The lack of sufficient positive incentives induced Norman kings to resort to fining non-participation to ensure that criminals were pursued and members of the court did not shirk their duties.

Frankpledge was introduced to deal with many of the same problems as the *bohr*, but it differed from the earlier institution in several important respects. First of all, royal fiat seems to have supplied the impetus for the adoption of frankpledge. Furthermore, whereas before a pledge group could refuse to admit an individual who was untrustworthy in the same way that a modern insurance company may refuse to cover an individual whom it considers a bad risk, the frankpledge system removed this element of choice (Warren 1987, 41). The displacement of voluntary association based on positive incentives by indiscriminate and coercive grouping undermined the ability to apply social

sanction, which was essential to the *borh's* effectiveness as an assurance agency for keeping peace and social order.

The centralization of law continued under the Angevin kings, particularly during the reign of Henry II, which included a great deal of legal innovation. This period saw the culmination of the complete transformation of the legal system. As Warren (1987, xiv) describes, under the Anglo-Saxons "There was no hierarchy of royal officials and there were no formally constituted offices of state….In contrast, by the middle of the thirteenth century royal authority was constantly exercised through an elaborate, bureaucratic, administrative system which reached out regularly into local communities and could deal directly with individuals." Subsequent extensions of the king's pleas provided a major avenue for the expansion of royal government into communities, and the royal court grew into a hierarchy of three separate tribunals due to the vast increase in the scope and number of cases tried in the king's name (Warren 1987, 133).

The principal cause of the centralization of law was that visiting royal justices, called *eyres,* replaced local officials as supervisors of the king's pleas. The role of itinerant justices had been waning, but Henry II vigorously revived them, organizing them into circuits and sending them off on regular visitations of the shires. The king's justices adjudicated royal pleas, including new categories specifically created by legislation called 'the king's assizes' (Warren 1987, 133). They also served as an administrative intermediary, and in so doing created a new relationship between the crown and its subjects. The justices were

responsible for fining tithings of frankpledge groups that they found lax in their policing, and they fined communities in which everyone was not a member of a tithing (Lyon 1980, 284). The fining function was particularly important, as it was becoming quite common for tithing members to fail their duties. For example, they might fail to call attention to a dead body or to put in surety those who were about to stand trial. In such cases those responsible would be put 'in mercy', and amerced an arbitrary sum decided by the eyres (Warren 1987, 139).

The increasing need to rely on such fines is explained by the dwindling benefits of voluntary participation. The elimination of restitution was significant in this regard, but additional factors were also involved. For example, unsuccessful suits resulted in the amercement of the plaintiff for false accusation (Lyon 1980, 295). Furthermore, to ensure use of their courts, and thus to get their profits, kings found it necessary to impose penalties for attempting to circumvent the system. For example, they made it a crime for a victim to accept restitution from his injurer in lieu of taking him to a hearing before the justice of the king, or to accept the return of stolen goods. (Laster 1970, 76).

The end result of the Angevin legal reformation was the complete subjugation of local custom and procedure to royal authority. The shires were no longer independent and self-contained units, as they had been on the eve of the Norman invasion. The hundred courts continued to play a central role in legal affairs, but they were completely subsumed and integrated into royal governance (Warren 1987, 199).

The local shires also continued to provide policing, in which they played an important role until the establishment of publicly funded police forces in the nineteenth century. However, coercive inducements to ensure victim and community participation were not adequate. The dissatisfaction among the populace and rising crime rates induced the creation of the public office of Justice of the Peace in 1326. Benson (1994, 258-260; 1998, 212-213) describes how public policing came to dominate law enforcement over the next several centuries. The course of this trajectory was inevitably set by the breakdown in efficiency due to the institutional shift that removed the incentives for victims and local communities to produce order.

IV. Conclusion

The history of medieval England demonstrates, contrary to common belief, that law and order can be provided in a decentralized manner. It also demonstrates that government law enforcement in England was not created for public interest reasons, but for public choice reasons. Law should not be categorized as necessarily requiring government provision, nor should it be assumed that government provides law to advance solely or even primarily the public interest.

From a positive analysis perspective, legal history casts doubt on the public interest view that government created law enforcement to address a market failure. From a normative perspective, history also undermines the public

interest view that ascribes legitimacy to government law enforcement because the public voluntarily chose it. Many of the early contributors to the field of public choice granted special legitimacy to government law enforcement because they believed that it is necessary for order (Gunning, 1972). But these assumptions may not be true, as history shows. In James Buchanan's more recent work, he seems to recognize that government law enforcement is not necessarily the only source of order. Buchanan (2004, 268) writes that the 1970s public choice scholars' Hobbesian assumptions "led us to neglect at the time any effort to work out what the alternative of ordered anarchy would look like. What would be the results if persons should behave so as to internalize all of the relevant externalities in their dealings among themselves?" The history of policing in England provides a partial answer to this question. It certainly was not perfect, but the polycentric system of one thousand years ago shows that order is possible without the government monopoly that we have today. Government control of law enforcement may simply be a means to enhance revenue and consolidate power for the state.

Of course, the foregoing history does not itself settle whether private provision is superior. However, just as when Coase (1974) famously pointed out that lighthouses were originally private, it does cast doubt on whether the public aspect of the good is enough to justify government provision. One could argue that government lighthouses and government courts are superior to private lighthouses and private courts, but these are separate arguments. The legal-

economic history presented here suggests shifting the debate to these separate arguments. This area of political economy is deserving of further careful theoretical and empirical study.

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